

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: April 18, 2005

TO : Helen Marsh, Regional Director
Region 3

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Renal Care of Buffalo
Cases 3-CA-24947, 25054, 530-4080-5000
and 25145 530-4080-5012-6700
530-4080-5042-3300

The Region submitted these Section 8(a)(1) and (5) cases for advice concerning whether the Employer's withdrawal of recognition satisfies the Levitz¹ "actual loss" standard or the Allentown Mack² "good faith uncertainty" test, and whether, in any event, the Employer's unremedied unfair labor practices tainted its withdrawal of recognition.

We conclude that the Employer cannot satisfy its burden under Levitz and also that the Employer's bad faith bargaining tainted its withdrawal of recognition. Therefore, absent settlement, the Region should issue a Section 8(a)(5) complaint.³ [FOIA Exemptions 2 and 5

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FACTS

Renal Care of Buffalo (the Employer) operates a kidney dialysis center in West Seneca, New York. The Employer maintains a business consulting relationship with TRC of New York (TRC), which is a subsidiary of DaVita, a California company that operates more than 550 for-profit dialysis centers throughout the country.

¹ Levitz Furniture Co. of the Pacific, 333 NLRB 717 (2001).

² Allentown Mack Sales & Service, Inc. v. NLRB, 522 U.S. 359 (1998).

³ The Injunction Litigation Branch will address the propriety of Section 10(j) interim relief in a separate memorandum.

CWA Local 1168 (the Union) has represented the Employer's employees since 1996. The Employer and Union have been parties to successive labor contracts, the latest of which expired on July 2, 2004⁴ but was extended for one month to August 2.

Negotiations for a successor contract began on May 27, and the parties had met 15 times as of August 24. Although DaVita officials had assisted in bargaining the Employer's past Union contracts, they played a more prominent role in the 2004 negotiations. For example, the Employer's 2004 bargaining team included only one Employer representative, Barbara Proudman; the other members were DaVita's Vice President of People Services, its Director of Labor and Teammate Relations, its assistant general counsel, and two attorneys DaVita retained as outside labor and employment counsel.⁵

At the Employer's insistence, the parties' first three meetings primarily concerned ground rules. The Employer informed the Union at the first session on May 27 that it intended to adopt the "Mission and Values of TRC of New York and DaVita" (Mission and Values). The Employer then made a PowerPoint presentation highlighting DaVita's operating philosophy and its Mission and Values, and emphasizing DaVita's belief that pay-for-performance should underlie any compensation system.

On May 28, the Employer distributed an employee memo announcing that contract negotiations had begun and that the Employer had "educated" the Union about its goal of negotiating an agreement that reflected DaVita's operating philosophy and its Mission and Values. The memo also stated that the Employer sought to determine whether the Union could "align" with the Mission and Values and characterized the Union's bargaining team as "overtly hostile and adversarial."

On June 1 and 2, Jack Stewart, a DaVita People Services manager, visited the Employer's facility. Proudman introduced him to employees and advised that

⁴ All dates are 2004 unless otherwise noted.

⁵ According to the Region, New York law currently prohibits the operation of for-profit dialysis centers, but the state legislature may repeal this provision. The Union believes that should the legislature do so, DaVita will acquire the Employer's facility, and that this explains why DaVita effectively directed the Employer's 2004 bargaining.

Stewart would question them individually on a voluntary basis. Without notice to the Union, Stewart questioned or attempted to question every unit employee about their reaction to such employment terms as pay-for-performance and flexible scheduling. The Region has concluded that Stewart, acting as an Employer agent, dealt directly with employees in violation of Section 8(a)(5).⁶

As early as June 8, the Union requested information about Stewart and the employee surveys he had conducted. The Employer did not provide this information to the Union until the parties' July 14 bargaining session.

In late June or early July, the Union posted a flyer entitled "What to know about the 'DaVita' visitors" on the bulletin board it maintained at the Employer's facility. The flyer listed questions employees should ask if a DaVita representative approached them, and also instructed employees to tell their stewards if this happened. The Employer removed the Union's flyer from the bulletin board but the Union reposted it. On July 14, the Employer posted a sign above the bulletin board announcing that re-posting the Union flyer violated the parties' contract, was prohibited by management, and would constitute just cause for discipline.⁷ The Union did not attempt to re-post this flyer, but instead posted a memo advising employees that it considered both the Employer's ban on re-posting the flyer and its threat of disciplinary action to be unlawful. The Region has concluded that the Employer's removal of the Union's flyer and attendant threats against re-posting violated Section 8(a)(1).⁸

The Employer's first contract proposal, submitted to the Union on June 23, reduced the 60-article expired agreement to one containing only 15 articles. The proposal included a sweeping management rights clause vesting the

⁶ See, e.g., Alexander Linn Hospital Assn., 288 NLRB 103, 106 (1988).

⁷ A week earlier, on July 7, the Employer's attorney wrote the Union asserting that the flyer was unprotected because it encouraged a work slowdown and interfered with patient care. The Union's response complained about Stewart's conduct and the Employer's failure to provide the Union with the information it had requested about his visit, and dismissed the work slowdown claim as specious.

⁸ See, e.g., Container Corp. of America, 244 NLRB 318, 321 (1979), enfd. in relevant part 649 F.2d 1213 (6th Cir. 1981).

Employer with the power to unilaterally determine many significant terms and conditions of employment previously governed by the expired contract.⁹ The proposal excluded from the contractual grievance-arbitration procedure everything within the scope of the management rights clause. The proposal also included a no-strike/no-lockout provision that, among other things, proscribed handbilling at any time and for any reason.¹⁰ During the course of bargaining, the Employer appeared to revise its management rights proposal by deleting language granting it the right to determine pay-for-performance amounts. Instead, the Employer incorporated that same language into its "incentive pay" proposal, which gave the Employer the unfettered right to decide the factors governing both employee eligibility for, and amounts of, such compensation, and excluded incentive pay and profit sharing determinations from the grievance arbitration procedure.¹¹ Since the Employer's proposals would leave the Union and employees with fewer rights and less protection than they would enjoy without a contract, the Region has concluded that the Employer violated Section 8(a)(5) by bargaining in bad faith.¹²

⁹ For example, the Employer retained sole and exclusive authority to promote; layoff; discipline; subcontract; schedule; transfer or relocate operations; promulgate, amend, revise, and enforce policies, rules, regulations, and practices; establish and alter performance standards; and determine compensation amounts and forms. It also required that the Union waive the right to bargain over the effects of the Employer's exercise of any prerogative reserved to it.

¹⁰ The Region noted that the handbilling prohibition constitutes an unlawful waiver under NLRB v. Magnavox Co. of Tennessee, 415 U.S. 322 (1974).

¹¹ The parties made little progress in the 11 sessions held after June 23. The Employer never modified numerous regressive proposals, including those addressing Union access, rights of Union stewards, and probationary employment, and offered only cosmetic revisions to other proposals, including its no-strike/no-lockout, grievance arbitration, non-discrimination, Union security, and dues check-off proposals.

¹² See, e.g., A-1 King Size Sandwiches, 265 NLRB 851 (1982); Public Service Co. of Oklahoma, 334 NLRB 487 (2001). In addition, the Region concluded that the Employer independently violated Section 8(a)(5) in late July when it unilaterally changed a past practice concerning how it scheduled employees who served on the Union's bargaining

Employees well knew that bargaining had been unproductive. The Union posted a bargaining update on its bulletin board on July 1, stating that the Employer had rejected the Union's proposals and sought to eliminate most of the expired contract's provisions safeguarding unit jobs and working conditions. Additionally, on August 12, the Union picketed the Employer's facility and presented the Employer with a petition signed by 25 employees reaffirming their support for the Union and demanding a fair contract.

Because negotiations were stalled, the Union assigned International representative Deborah Hayes to its bargaining team. At the first bargaining session she attended, on August 5, the parties discussed the Employer's sweeping management rights proposal. The Employer maintained that the proposal incorporated the flexibility it needed to implement DaVita's Mission and Values and to align the Employer's facility with DaVita's other centers. Hayes stated that while she was not necessarily opposed to the Employer's proposal, the Union could not accept it without first learning about DaVita's programs, practices, and policies. The Employer replied that it would take her request under advisement.

On August 9, Hayes requested copies of all policies and procedures outlining work rules, employment conditions, wages, and benefits that the Employer's proposal would exclude from the collective-bargaining agreement. Hayes also requested copies of all policies and procedures applicable to TRC and DaVita employees with job titles comparable to those in the bargaining unit. Hayes noted that this information was relevant in light of the Employer's claim that its proposal was based on its adoption of TRC's and DaVita's "culture, methods, and style of operations." On August 17, the Employer criticized the Union for waiting to request this information until two months into negotiations, and demanded that the Union explain its relevance. Hayes reiterated in her August 23 reply that because the Employer's proposed management rights clause would require the Union to waive bargaining over so many terms and conditions of employment, the Employer could not reasonably expect the Union to accept the proposal without first learning more about DaVita's wage, benefit, and employment policies. The Employer never responded. The Region has concluded that the Employer's

team. Apparently, unit employees were unaware of this latter violation and the parties held few bargaining sessions after the Employer changed its scheduling practice.

failure to provide the Union with this information violated Section 8(a)(5). According to the Region, unit employees were unaware of this unfair labor practice.

On September 3, the Employer received a petition signed by 15 unit employees indicating that they no longer desired Union representation.¹³ The Employer claims that the employees who presented this petition stated that other employees would have signed, but did not for fear of the Union's reaction. The Employer will not identify the petition presenters, nor can it say how many employees assertedly would have, but did not, sign this petition. On September 10, the Employer withdrew recognition from the Union and contended that the 15-signature petition established that the Union no longer enjoyed majority employee support because there were 30 employees in the bargaining unit at the time. However, [FOIA Exemption 7(D) ,] the Region has concluded that the Employer erroneously classified at least these two employees, and possibly a third employee, as temporary employees, incorrectly excluding them from the unit. Since the Region thus concluded that there were 32, and perhaps 33, bargaining unit employees when the Employer withdrew recognition, the Region found that the September 3 petition did not establish lack of majority support.

Between September 14 and 16, the Union obtained 16 signatures on a second pro-Union petition. On September 18, Hayes advised the Employer that she possessed objective evidence that the Union still enjoyed majority employee support. Hayes demanded that the Employer resume bargaining and noted that the Union had yet to receive the information she first requested on August 5. The Employer did not respond to Hayes' September 18 letter; the parties have had no further contact.

ACTION

We conclude that the Employer's withdrawal of recognition is unlawful under Levitz and that the Employer's bad faith bargaining also tainted its withdrawal of recognition. [FOIA Exemptions 2 and 5

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- A. The Employer cannot show that the Union had actually lost majority employee support as of the date it withdrew recognition, as Levitz requires.

¹³ Eleven of these employees had also signed the August 12 pro-Union petition.

In Levitz, the Board held that an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of a numerical majority of bargaining unit employees. Here, the Region has found that the bargaining unit numbered at least 32 employees when the Employer withdrew recognition on September 10. The September 3 petition, containing 15 signatures, thus fails to establish that the Union had actually lost support from a majority of unit employees. Accordingly, we conclude in agreement with the Region that the Employer unlawfully withdrew recognition from the Union under the Levitz standard.

We note that the Region need not rely on the August 12 pro-Union petition as counter-evidence of Union support because the anti-Union petition itself fails to establish actual loss of majority. The mid-September post-withdrawal pro-Union petition also is legally irrelevant. The Board stated in Levitz that an employer is required to prove by a preponderance of evidence that the union lost majority support at the time the employer withdrew recognition.¹⁴ Since the Union's majority status must be measured as of September 10, evidence of employee support gathered after that date is of no consequence.

B. The Employer's bad faith bargaining tainted its withdrawal of recognition.

An employer cannot withdraw recognition in the face of unremedied unfair labor practices tending to cause employees to become disaffected from the union.¹⁵ However, not every unfair labor practice will taint evidence of a union's subsequent loss of majority support; in cases involving unfair labor practices other than a general refusal to recognize and bargain, as here, specific proof of a causal relationship must exist between the unfair

¹⁴ 333 NLRB at 725. See also Memorandum GC 02-01, "Guideline Memorandum Concerning Levitz," dated October 22, 2001, at pp.6-7 (explaining, *inter alia*, that Levitz reaffirmed the proposition set forth in AMBAC International, 299 NLRB 505, 506 (1990), that evidence relating to a union's majority status is evaluated as of the time of the employer's withdrawal).

¹⁵ See, e.g., RTP Co., 334 NLRB 466, 468 (2001), *enfd.* 315 F.3d 951 (8th Cir. 2003), *cert. denied* 540 U.S. 811 (2003) (internal citations omitted).

labor practices and the ensuing loss of support.¹⁶ In determining whether a causal relationship exists, the Board examines various factors, including (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and union membership.¹⁷

The Board has specifically determined that bad faith bargaining may taint a withdrawal of recognition. In Fruehauf Trailer Services,¹⁸ the Board found a causal relationship between the employer's unlawful refusal to meet and bargain with the union at reasonable times and intervals and the anti-union petition on which the employer based its withdrawal of recognition. Applying Master Slack, the Board noted that the employer's withdrawal of recognition occurred in the midst of its unlawful bargaining, and that dilatory bargaining tactics have long been recognized as tending to generate employee disaffection, to negatively affect employee organizational activities and union membership, and to convey a message that union activity is futile.

In Radisson Plaza Minneapolis,¹⁹ the Board found that the employer's unfair labor practices away from the table,²⁰ together with its bad faith tactics at the table which were calculated to frustrate agreement, had the reasonably foreseeable consequence of causing employee disaffection from the union.²¹ The Board also specifically noted that the employer had insisted on incorporating in its labor contract an employee handbook which allowed the employer to

¹⁶ See, e.g., Lee Lumber & Building Material Corp., 322 NLRB 175, 177 (1996).

¹⁷ Master Slack Corp., 271 NLRB 78, 84 (1984).

¹⁸ 335 NLRB 393, 394 (2001).

¹⁹ 307 NLRB 94 (1992), *enfd.* 987 F.2d 1376 (8th Cir. 1993).

²⁰ These included refusing to discuss job assignment changes, granting 40% of the workforce a unilateral wage increase, and failing to timely provide the union with requested information, each of which independently violated Section 8(a)(5). See 307 NLRB at 95, 112.

²¹ Id. at 96.

unilaterally alter or discontinue any of the benefits or policies it contained. The Board determined that this would operate as a perpetual reopener clause, a provision at odds with the basic concept of a collective-bargaining agreement.²² The Board noted that because of the employer's unlawful conduct, "employees would see no change in their working lives from having a collective-bargaining representative."²³ Accordingly, the Board held that the employer was not privileged to withdrawal recognition based on a decertification petition because it was tainted by the employer's unlawful bargaining.²⁴

We conclude that the Employer's bad faith bargaining here was also causally related to the Union's loss of employee support, and [FOIA Exemptions 2 and 5 .]²⁵ Here, as in Fruehauf, the Employer's ongoing bad faith bargaining occurred around the same time as the employee expression of disaffection. More importantly, here as in both Fruehauf and Radisson Plaza, a clear nexus exists between the Employer's bad faith bargaining and the Union's loss of support. Employees were well-aware that negotiations had been unproductive largely due to the Employer's harsh and resolute demands. In fact, on August 12, employees picketed the Employer and presented it with an employee petition voicing support for the Union and demanding a fair contract.

We recognize that dilatory bargaining tactics were at issue in Fruehauf, rather than extreme and regressive proposals involved here, and also that the employer in Radisson Plaza committed a greater number of arguably more serious violations than did the Employer here. Nevertheless, both those cases clearly support finding a tainted loss of employee support here where the Employer's serious bad faith bargaining tactics were both well known to unit employees and equally likely to cause employee

²² Id. at 95.

²³ Id. at 96.

²⁴ Id. at 96-97, 115.

²⁵ [FOIA Exemptions 2 and 5

disaffection from the Union. In particular, we note that the Employer's regressive proposals, like the employer's handbook demand in Radisson Plaza, would reasonably generate anti-Union employee sentiment.

[FOIA Exemptions 2 and 5]

.]²⁶ Finally, we regard the Employer's unlawful refusal to provide the Union with relevant information it first requested on August 5 as part and parcel of its bad faith bargaining tactics. However, the Region found that employees were unaware of this unfair labor practice and, therefore, we conclude that this independent violation also is not causally related to the Union's ensuing loss of support.²⁷

C. [FOIA Exemptions 2 and 5]

[FOIA Exemptions 2 and 5]

²⁶ [FOIA Exemptions 2 and 5]

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²⁷ See, e.g., Airport Aviation Services, 292 NLRB 823, 832 (1989) (withdrawal of recognition not tainted by unlawful refusals to provide information where, *inter alia*, no evidence employees were aware of these ULPs or became disaffected because of them).

[FOIA Exemptions 2 and 5, cont'd.
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[FOIA Exemptions 2 and 5

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[FOIA Exemptions 2 and 5

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[FOIA Exemptions 2 and 5

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²⁹ [FOIA Exemptions 2 and 5

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³⁰ [FOIA Exemptions 2 and 5

[FOIA Exemptions 2 and 5, cont'd.

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For all the foregoing reasons, we conclude that the Employer unlawfully withdrew recognition and that the Region should issue a Section 8(a)(5) complaint, absent settlement.

B.J.K.

[FOIA Exemptions 2 and 5, cont'd

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